

After reviewing the record and considering the arguments, the Appeals Board finds the award of benefits for 100 percent disability to the right eye should be affirmed. The award of penalties should be reversed.

Findings of Fact

1. On July 21, 1997, claimant injured his right eye when particles from a bag of double ammonium phosphate got into the eye.
2. Claimant first saw Dr. Steve Cauble and Dr. Chris A. Knobbe and was then referred to Dr. William S. Clifford for a second opinion regarding possible correction of damage to the cornea. On September 12, 1997, Dr. Clifford performed a cornea transplant. Claimant testified that he now suffers from double vision and has problems with depth perception. Claimant testified he can no longer hunt, fish at night, or drive.
3. At respondent's request, Geoffrey Gates conducted a surveillance of claimant on July 16, 17, and 18, 1999. He observed claimant backing a fifth-wheel into a camping spot, guided by his wife. He also observed claimant playing horseshoes and walking up and down a steep, rocky embankment.
4. On November 7, 1998, Dr. Clifford tested claimant for purposes of providing an impairment rating. He found claimant suffers from loss of binocular vision and has diplopia or double vision. He rated the impairment, pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, as 100 percent. Dr. Clifford also testified that claimant should be able to engage in most activities at home and could drive with corrected vision.
5. Claimant's impairment was evaluated by two other physicians. Dr. Michael P. Varenhorst, an ophthalmologist, rated the impairment as 46.21 percent for loss of visual acuity only. He did not base his rating on the *AMA Guides*. He testified his rating took into consideration only one of three areas to be measured under the *Guides* and agreed claimant would be entitled to some additional impairment, but he did not know how much. He also testified that, if Dr. Clifford's testing was correct, claimant's impairment would be 100 percent based on the *AMA Guides*.

Dr. Mark L. Wellemeyer, also an ophthalmologist, found claimant has a 38 percent impairment for vision decrease, again one of the three areas measured under the *Guides*. He found no loss in field of vision and testified he found double vision but could not measure it accurately. Dr. Wellemeyer agreed his rating was only a partial rating under the *Guides*.

Conclusions of Law

1. The Board agrees with and affirms the finding that claimant has a 100 percent impairment to the right eye. Dr. Clifford, who rated the impairment at 100 percent, gave the only complete rating under the *Guides*.

Impairment is to be based on the *Guides* unless the impairment is not contained in the *Guides*. K.S.A. 44-510e. The information from the investigator does not convince the

Board that Dr. Clifford's rating is inaccurate. The information from the investigator does not show claimant engaged in any activity the medical experts said he could not do. None of the medical experts saw the videotape. As a consequence, we have no expert opinion about whether the activities shown on the tape are inconsistent with claimant's presentation at the various medical examinations.

2. The Board concludes the award of penalties under K.S.A. 44-512b should be reversed. The award of penalties was based on the position that, at a minimum, respondent should have paid benefits under the lower of the various impairment ratings. But respondent had, the Board finds, asserted in good faith, based on the videotape, that even the lower rating might not be correct. The ratings rely, in part, on claimant's credibility. Respondent contended that even the lower rating was tainted by inaccurate information from the claimant. Although the Board now finds that a 100 percent rating is appropriate, the Board concludes respondent had just cause or excuse for not paying the benefits and the award of an interest penalty should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on May 25, 2000, should be, and the same is hereby, modified. The award of benefits for 100 percent disability to the right eye should be affirmed and the award of penalties should be reversed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Kurt W. Ratzlaff, Wichita, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director